AFFIN BANK BHD

v.

SUCCESSCOM ENTERPRISE SDN BHD

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ZULKEFLI MAKINUDIN JCA
HASAN LAH JCA
[CIVIL APPEAL NO: J-02-520-2006 & OTHER APPEALS]
22 SEPTEMBER 2008

CIVIL PROCEDURE: *Summary judgment - Appeal - Fresh or further evidence - Reasonable diligence - Determining influence - Whether circumstances warranted plaintiff's claim being tried*

CIVIL PROCEDURE: *Appeal - Fresh evidence - Adducing of, application for - Summary judgment - Reasonable diligence - Determining influence*

EVIDENCE: *Fresh or further evidence - Application to adduce - Summary judgment - Reasonable diligence - Determining influence*

CIVIL PROCEDURE: *Admission - Judgment on admission, application for - Absence of essential component of plaintiff's cause of action - Rules of the High Court 1980, O. 27 r. 3*

CIVIL PROCEDURE: *Judgment - Admission - Judgment on admission of facts - Absence of essential component of plaintiff's cause of action - Rules of the High Court 1980, O. 27 r. 3*

These were three related appeals by the defendant arising from a decision of the High Court judge ('judge') dated 23 May 2006. The first appeal was against the judge's decision dismissing the defendant's application to adduce fresh evidence for the hearing of an appeal against a summary judgment entered against the defendant on 10 March 2006. The second appeal was against the decision of the judge affirming the summary judgment entered against the defendant on 10 March 2006, while the third appeal was against the judge's decision allowing the plaintiff's application to enter judgment based on an admission of facts under O. 27 r. 3 of the Rules of the High Court 1980 ('RHC'). On 1 August 2005, the plaintiff filed a writ action against the defendant for conversion of 2,150 cheques; alternatively, the plaintiff's action

was for money had and received. On 9 February 2006, the plaintiff filed and served an application for summary judgment for RM20,000,423.25 as damages for conversion of 1,366 cheques or for money had and received. The deputy registrar allowed the application for summary judgment, which decision the defendant appealed against ('summary judgment appeal'). The plaintiff subsequently filed an application for judgment for the balance of the 784 cheques ('remaining cheques') to be entered against the defendant in the sum of RM10,263,832.93 under O. 27 r. 3 of the RHC ('O. 27 application'). On 31 March 2006, the defendant filed an application to adduce fresh evidence for the hearing of the summary judgment appeal ('fresh evidence application'). The defendant applied for leave to adduce two affidavits, namely: (i) the defendant's affidavit affirmed by one Low Soon Hock on 14 March 2006 ('defendant's 2nd affidavit'); and (ii) the affidavit filed by one third party customer of the defendant, United Refrigerator Trading Sdn Bhd ('URT'), and affirmed by a director of URT on 21 March 2006 ('URT's affidavit'). The judge ordered the dismissal of the summary judgment appeal and the fresh evidence application, but allowed the O. 27 application. The defendant thus lodged the present appeals against all the three orders of the judge.

Held (allowing the appeals)

Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) Since the fresh evidence application was filed for the hearing of the defendant's appeal against the summary judgment obtained pursuant to O. 14 r. 1 of the RHC, the court should consider whether the evidence in the defendant's 2nd affidavit and URT's affidavit would have a determining influence on two matters: (a) whether there were issues of fact and/or law to be tried in respect of the plaintiff's claim; and (b) whether there were some other reasons for a trial of the plaintiff's claim. On the evidence, the judge erred in fact and in law by failing to appreciate that the defendant had exercised reasonable diligence to obtain the evidence contained in the defendant's 2nd affidavit and URT's affidavit. The judge also erred by failing to appreciate that the defendant's 2nd affidavit and URT's affidavit would have a determining influence on whether there were some other reasons for a trial

of the plaintiff's claim. Hence, the defendant's fresh evidence application ought to have been allowed. *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* (foll). (paras 5, 6, 17 & 18)

(2) Having allowed the fresh evidence application, it was apparent that the defendant's appeal against the decision of the judge affirming the summary judgment had to be allowed. There were a number of circumstances, based on the fresh evidence adduced, that warranted the plaintiff's claim being tried. (paras 19 & 20)

(3) If the plaintiff elected to enter judgment against the defendant for money had and received, the plaintiff must establish that it was entitled to those monies. The plaintiff did not produce any evidence to establish that the monies under the remaining cheques belonged to it. In fact, the plaintiff did not even produce copies of the remaining cheques as exhibits for the O. 27 application. The defendant in the present case did not admit that the monies under the remaining cheques belonged to the plaintiff. In the absence of this essential component of the plaintiff's cause of action, the judge had erred in fact and in law by allowing the judgment to be entered against the defendant. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah tiga rayuan berkaitan oleh defendan yang berbangkit daripada satu keputusan hakim Mahkamah Tinggi ('hakim') bertarikh 23 Mei 2006. Rayuan pertama ialah terhadap keputusan hakim menolak permohonan defendan untuk mengemukakan keterangan baharu bagi pembicaraan suatu rayuan terhadap sesuatu penghakiman terus yang dicatat terhadap defendan pada 10 Mac 2006. Rayuan kedua ialah terhadap keputusan hakim mengesahkan penghakiman terus yang dicatat terhadap defendan pada 10 Mac 2006, sementara rayuan ketiga ialah terhadap keputusan hakim membenarkan permohonan plaintif untuk mencatat penghakiman berdasarkan suatu pemasukan fakta-fakta di bawah A. 27 k. 3 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Pada 1 Ogos 2005, plaintif memfail satu tindakan writ terhadap defendan untuk penukaran 2,150 cek-cek; sebagai alternatif, tindakan plaintif ialah untuk wang yang ada dan yang telah diterima. Pada 9 Februari 2006, plaintif memfail dan

menyampaikan bagi penghakiman terus untuk RM20,000,423.25 sebagai ganti rugi untuk penukaran 1,366 cek-cek ataupun untuk wang yang ada dan yang telah diterima. Penolong pendaftar membenarkan permohonan untuk penghakiman terus, yang mana keputusan itu defendan merayu terhadap ('rayuan penghakiman terus'). Plaintif kemudiannya memfail satu permohonan untuk penghakiman bagi baki 784 cek-cek ('cek-cek tertinggal') untuk dicatat terhadap defendan dalam jumlah RM10,263,832.93 di bawah A. 27 k. 3 KMT ('permohonan A. 27'). Pada 31 Mac 2006, defendan memfail suatu permohonan untuk mengemukakan keterangan baharu bagi pembicaraan rayuan penghakiman terus itu ('permohonan keterangan baharu'). Defendan memohon kebenaran untuk mengemukakan dua afidavit, iaitu: (i) afidavit oleh defendan yang diesahkan oleh seorang Low Soon Hock pada 14 Mac 2006 ('afidavit kedua defendan'); dan (ii) afidavit yang difailkan oleh satu pelanggan pihak ketiga defendan, United Refrigerator Trading Sdn Bhd ('URT'), dan diesahkan oleh seorang pengarah URT pada 21 Mac 2006 ('afidavit URT'). Hakim mengarahkan penolakan rayuan penghakiman terus dan permohonan keterangan baharu, tetapi membenarkan permohonan A. 27. Defendan, oleh itu, membuat rayuan-rayuan semasa terhadap kesemua tiga perintah hakim.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Zulkefli Makinudin HMR menyampaikan penghakiman mahkamah:

(1) Oleh kerana permohonan keterangan baharu telah difailkan selepas pembicaraan rayuan defendan terhadap penghakiman terus yang diperolehi mengikut A. 14 k. 1 KMT, mahkamah sepatutnya menimbangkan sama ada keterangan dalam afidavit kedua defendan dan afidavit URT akan mempunyai pengaruh penentu atas dua perkara: (a) sama ada terdapat isu-isu fakta dan/atau undang-undang untuk dibicara berkenaan dengan tuntutan plaintif; dan (b) sama ada terdapat sebab-sebab lain bagi perbicaraan tuntutan plaintif. Atas keterangan, hakim telah khilaf dalam fakta dan dalam undang-undang kerana gagal mempertimbangkan bahawa defendan telah melaksanakan ketekunan munasabah dalam memperolehi keterangan yang ada dalam afidavit kedua defendan dan afidavit URT. Hakim juga khilaf kerana gagal mempertimbangkan bahawa afidavit kedua defendan dan afidavit URT akan mempunyai pengaruh penentu

atas sama ada terdapat apa-apa sebab lain bagi perbicaraan tuntutan plaintif. Oleh itu, permohonan keterangan baharu defendan sepatutnya dibenarkan. *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* (diikuti).

(2) Setelah membenarkan permohonan keterangan baharu, ia adalah jelas bahawa rayuan defendan terhadap keputusan hakim mengesahkan penghakiman terus mesti dibenarkan. Terdapat beberapa keadaan, berdasarkan keterangan baharu yang dikemukakan, yang membuatkan tuntutan plaintif seharusnya dibicara.

(3) Jika plaintif memilih untuk mencatat penghakiman terhadap defendan bagi wang yang ada dan yang telah diterima, plaintif mesti membuktikan bahawa ia berhak mendapat wang itu. Plaintif tidak mengemukakan apa-apa keterangan untuk membuktikan bahawa wang di bawah cek-cek tertinggal dimiliki olehnya. Sebenarnya, plaintif tidak mengemukakan salinan-salinan cek-cek tertinggal sebagai ekshibit untuk permohonan A. 27. Defendan dalam kes semasa tidak mengakui bahawa wang di bawah cek-cek tertinggal dimiliki oleh plaintif. Dalam ketiadaan komponen perlu ini dalam kausa tindakan plaintif, hakim telah khilaf dalam fakta dan dalam undang-undang dengan membenarkan penghakiman untuk dicatat terhadap defendan.

Case(s) referred to:

AL Underwood Ltd v. Bank of Liverpool and Matins [1924] 1 KB 775 ***(refd)***

In Re Wright Kirke v. North [1895] 2 Ch 747 ***(refd)***

Marfani & Co Ltd v. Midland Bank Ltd [1968] 1 WLR 956 ***(refd)***

Perwira Habib Bank (M) Bhd v. Hj Abdullah Hj Sulaiman & Anor [1985] 2 CLJ 489; [1985] CLJ (Rep) 639 HC ***(refd)***

United Australia Ltd v. Barclays Bank Ltd [1941] AC 1 ***(refd)***

United Malayan Banking Corp Bhd v. Kek Tek Huat & Ors [1990] 1 CLJ 429; [1990] 1 CLJ (Rep) 301 SC ***(refd)***

United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(foll)***

Zanda Investment Ltd v. Bank of America National Trust and Savings Association & Ors [1994] 2 HKC 409 ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, ss. 8(1), 81A, 85(2)(a), 95

Civil Law Act 1956, s. 12

Rules of the High Court 1980, O. 14 r. 1, O. 27 r. 3, O. 32 r. 13(2), O. 56 r. 1(3A)

A *For the appellant - Datuk DP Naban (Andrew Chiew & LB Loh with him); M/s Lee Hishammuddin Allen & Gledhill*
For the respondent - M Patmanathan (C Kumareson & R Vasanthan with him); M/s Julie Lim, Vasanthan & Co

B *[Appeal from High Court, Johor Bahru; Civil Suit No: MT3-22-530-2005]*

Reported by Suresh Nathan

C

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

D **[1]** These are three related appeal cases fixed for hearing before us arising from the decision of the learned judge of the High Court at Johor Bahru. The first appeal case No. J-02-521-2006 is in respect of the defendant's appeal against the decision of the learned judge given on 23 May 2006 in dismissing the defendant's application to adduce fresh evidence for the hearing of an appeal
E against a summary judgment entered against the defendant on 10 March 2006 ("Order dated 23 May 2006"). The second appeal case No. J-03-90- 2006 is in respect of the defendant's appeal against the decision of the learned judge in affirming the
F summary judgment entered against the defendant on 10 March 2006. The third appeal case No. J-02-520-2006 is in respect of the defendant's appeal against the decision of the learned judge given on 23 May 2006 in allowing the plaintiff's application to enter judgment based on admission of facts under O. 27 r. 3 of
G the Rules of High Court ("RHC 1980") ("Judgment dated 23 May 2006").

Background Facts And Chronology Of Events

[2] The relevant background facts and the chronology of events
H leading to the present three appeal cases by the defendant are as follows:

(1) On 1 August 2005 the plaintiff filed a writ action against the defendant for conversion of 2,150 cheques. Alternatively, the
I plaintiff's action was for money had and received. The plaintiff's claim was for RM30,264,256.18 as damages for conversion or money had and received.

(2) On 9 February 2006 the plaintiff filed and served an application for summary judgment for RM20,000,423.25 as damages for conversion of 1,366 cheques ("cheques") or for money had and received ("summary judgment application"). The summary judgment application was fixed for hearing on 10 March 2006.

(3) On 6 March 2006 the defendant filed and served an affidavit in reply to oppose the summary judgment application ("defendant's affidavit").

(4) On 7 March 2006 the plaintiff filed and served an affidavit in reply to the defendant's affidavit ("plaintiff's affidavit").

(5) On 10 March 2006 at the hearing of the summary judgment application before the deputy registrar, the defendant's counsel applied for an adjournment in order to take instructions from the defendant on the averments made in the plaintiff's affidavit. The plaintiff's counsel opposed the application for adjournment. The deputy registrar declined the adjournment. The deputy registrar proceeded with the hearing of the summary judgment application. The deputy registrar allowed the summary judgment application against the defendant ("judgment dated 10 March 2006").

(6) On 10 March 2006 the defendant filed a notice of appeal to judge in chambers against the judgment dated 10 March 2006 ("summary judgment appeal"). The defendant appealed against the following:

(a) refusal to allow an adjournment; and

(b) allowing the judgment dated 10 March 2006.

(7) On 15 March 2006 the plaintiff subsequently filed an application for judgment for the balance of the 784 cheques ("the remaining cheques") to be entered against the defendant in sum of RM10,263,832.93 under O. 27 r. 3 of the RHC 1980 ("Order 27 Application").

(8) On 31 March 2006 the defendant filed an application for leave to adduce fresh evidence for the hearing of the summary judgment appeal ("Fresh Evidence Application"). The defendant applied for leave to adduce two affidavits, namely:

A (a) the defendant's affidavit affirmed by Low Soon Hock on 14 March 2006 ("defendant's 2nd affidavit"); and

(b) the affidavit filed by one third party customer of the defendant, United Refrigerator Trading Sdn. Bhd
B ("URT") and affirmed by a director of URT, Lim Jeng Hong on 21 March 2006 ("URT's affidavit").

(9) On 23 May 2006 the High Court Judge heard the summary judgment appeal, the Order 27 Application and the Fresh Evidence Application. The High Court Judge ordered that:
C

(a) the summary judgment appeal to be dismissed.

(b) The Order 27 Application to be allowed and the plaintiff was granted leave to enter judgment in the sum
D of RM10,263,832.93 against the defendant; and

(c) The Fresh Evidence Application to be dismissed.

(10) On 24 May 2006 the defendant lodged an appeal against all the above three orders made by the learned judge of the
E High Court.

Decision Of The Court On Appeal

[3] We heard the three appeal cases and delivered our oral
F decision on 6 April 2007. We now give our reasons in arriving at our decisions.

[4] We shall first deal with the appeal by the defendant against the order of dismissal of the High Court in respect of the dismissal of the defendant's Fresh Evidence Application as in Appeal case
G No. J-02-521-2006. The Fresh Evidence Application was made under O. 56 r. 1(3A) of the RHC 1980. In such an application, the applicant is required to satisfy the following criteria:

(a) at the hearing before the registrar the new evidence was not
H available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the
I decision of the registrar.

[5] We are also of the view since the Fresh Evidence Application was filed for the hearing of the defendant's appeal against the summary judgment obtained pursuant to O. 14 r. 1 of the RHC 1980, the court should consider whether the evidence in the defendant's 2nd affidavit and URT's affidavit would have a determining influence on two matters:

(a) whether there are issues of fact and/or law to be tried in respect of the plaintiff's claim; and

(b) whether there are some other reasons for a trial of the plaintiff's claim (See the case of *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151).

[6] In this case we find that the learned judge of the High Court erred in fact and in law by failing to appreciate that the defendant have exercised reasonable diligence to obtain the evidence contained in the defendant's 2nd affidavit and URT's affidavit. This is evidenced by the following sequence of events:

(a) in the plaintiff's affidavit, the plaintiff denied that there was any agreement between the plaintiff and URT that the cheques will be paid into URT's account. As such, it became necessary for the defendant to adduce evidence to contradict the plaintiff's denial;

(b) the plaintiff's affidavit was served on the defendant's former solicitors, Messrs. Azzat & Izzat on 7 March 2006. The Summary Judgment Application was fixed for hearing on 10 March 2006;

(c) Messrs. Azzat & Izzat needed time to prepare an affidavit to be affirmed by the officer for the defendant and the director of URT. In this regard, it is to be noted that the defendant's former solicitors, Messrs. Azzat & Izzat were based in Kuala Lumpur. The deponents of the defendant's 2nd affidavit and URT affidavit were both based on Johor;

(d) In the circumstances of the case, Messs. Azzat & Izzat had to contact the plaintiff's solicitors as to whether they were agreeable to an adjournment of the hearing of the Summary Judgment Application on 10 March 2006 in order for the defendant to file an affidavit in reply to the plaintiff's affidavit. The plaintiff's solicitors were not agreeable to the adjournment;

(e) Messrs. Azzat & Izzat then wrote to the deputy registrar of an adjournment. Messrs. Azzat & Izzat did not receive any reply;

(f) On 10 March 2006, the defendant's counsel attended court to apply for an adjournment of the hearing of the Summary Judgment Application. The plaintiff objected to the application.

[7] It is our considered view that the deputy registrar's decision was a wrongful exercise of discretion because the plaintiff's affidavit contained substantive averments of fact, in particular the plaintiff's denial that there was an agreement between the plaintiff and URT that the cheques will be paid into URT's account. We also find the defendant has 14 days from the date of service of the plaintiff's affidavit to file and serve an affidavit in reply under O. 32 r. 13(2) of the RHC 1980. On 10 March 2006, the defendant still had time to file and serve an affidavit in reply to the plaintiff's affidavit. The defendant was therefore compelled therein to oppose the Summary Judgment Application on 10 March 2006 when the factual averments contained in the plaintiff's affidavit stand unrebutted.

[8] We also find the monies collected by the defendant and paid over to URT were to settle debts due and owing by the plaintiff to URT. This can be seen from a comparison of some of the cheques and the entries made in URT's monthly general ledger which show that the debts owed by the plaintiff has been reduced in accordance With the value of the said cheques. Some of the examples are set out as follows:

	Cheque No.	Amount (RM)	Date Of Cheque	Date of Entry on General Ledger
(a)	AMBB 356877	2,487.50	12 July 2002	July 2002
(b)	AMBB 370966	5,789	13 September 2002	September 2002
(c)	RHB 451807	4,272	7 August 2002	August 2002
(d)	RHB 464762	2,980	14 August 2002	August 2002

[9] We take the view assuming the defendant is in fact liable, the amount payable to the plaintiff will be accordingly reduced because the plaintiff's debts to URT have been accordingly reduced. We also noted that in URT's affidavit, the director of

URT, Lim Jeng Hong had explained in detail that the cheques were used to settle the debts due and owing by the plaintiff to URT. These debts arose from the goods sold by URT to the plaintiff.

[10] It is our judgment if the defendant's 2nd affidavit and URT's affidavit were admitted during the hearing of Summary Judgment Application; it would have a determining influence on whether the plaintiff is entitled to the entire judgment sum that the plaintiff applied for in the Summary Judgment Application and if not, what is the actual amount due and payable by the defendant to the plaintiff consequent to the reduction.

[11] We are also of the view that it is a triable issue as to whether the defendant is entitled to rely on the defence of estoppel against the plaintiff's claim in conversion or money had and received. We find that the plaintiff have by their own conduct represented to the defendant that the plaintiff had no objection to the defendant collecting the cheques and paying the proceeds thereof into URT's account. On this point we find that the plaintiff did not make any protest whatsoever in respect of the cheques that were paid into URT's account between 1999 and 2005. The plaintiff had only protested and made a demand in 2005.

[12] The defendant has alleged there was an agreement between the plaintiff and URT that the cheques will be paid into URT's account. In the plaintiff's affidavit, the plaintiff however, has denied that there was such an agreement. We find the defendant's 2nd affidavit and URT's affidavit contained substantial evidence relating to whether there was such an agreement between the plaintiff and URT. If the evidence contained in the defendant's 2nd affidavit and URT's affidavit were brought to the attention of the deputy registrar, the evidence would have a determining influence on the following triable issues:

(a) whether the plaintiff is estopped from contending that there was an agreement between the plaintiff and URT that the cheques will be paid into URT's account; and

(b) if so, whether the plaintiff is estopped from alleging that the defendant is liable in conversion or for money had and received.

[13] Learned counsel for the plaintiff in his argument before us vigorously submitted for all the three appeal cases by the defendant that in law a cheque that is crossed "account payee" or "a/c payee" with or without the word "only" is not transferable/ negotiable and can only be credited into the account of the named payee. This is mandatorily provided for by s. 81A of the Bills of Exchange Act 1949 ("the Act"). It is the plaintiff's case that all the cheques have been drawn in favour of the plaintiff on an "account payee" basis. It was submitted for the plaintiff that s. 81A of the Act was introduced by amendment in Parliament to make cheques cross "account payee" absolutely non-transferable even if there is an indorsement on the cheque. The plaintiff further relied on s. 8(1) of the Act which provides as follows:

> When a bill contains words prohibiting transfer, or indicating that it should be transferable, it is valid as between the parties thereto, but is not negotiable.

[14] It is the plaintiff's contention that the combined effect of s. 81A when read together with s. 8(1) of the Act constitutes a clear and absolute statutory bar or prohibition to a collecting bank to crediting a cheque crossed "account payee" into the account of any party other than the named payee. The plaintiff contended that the defendant repeated harping that there has to be a trial of the action to determine if the plaintiff is the true owner of the cheques is baseless and unfounded. To the plaintiff it has no application in the context of cheque marked "a/c payee" because the law only recognizes the named payee. Crossed cheques belong to a special category which is an exception because a crossed cheque is not negotiable and the issue of "true owner" and "right to immediate possession" do not arise in so far as cross cheques are concerned.

[15] With respect to the above contention of the plaintiff we are of the view that the defendant is not precluded from relying on s. 85 of the Act as a defence to the plaintiff's claim. Section 85 provides a statutory defence to collecting banks in respect of claim made by true owners of cheques, whether brought in conversion or for money had and received. Section 85 of the Act relieves a collecting bank from liability provided that the bank discharges its burden in proving that the bank had acted in good faith and without negligence. In determining good faith, s. 95 of the Act

stipulates that a thing is deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not. In order to establish that the defendant was not negligent, the defendant needs to establish that the defendant has taken reasonable care to refrain from taking any such step which the defendant foresees is, or ought reasonably to have foreseen was, likely to cause loss or damage to the true owner.

[16] It is our view that based on s. 85 of the Act the fact that a cheque has been crossed in accordance with s. 81A of the Act does not necessarily preclude the defendant from claiming this defence. This is clearly provided under s. 85(2)(a) of the Act. As stated earlier, the defendant's 2nd affidavit and URT's affidavit contained evidence to show that there was an agreement between the plaintiff and URT that the cheques will be paid into URT's account. If the deputy registrar had considered the evidence in the affidavits, the affidavits would have a determining influence on whether the defendant acted in good faith and was not negligent in collecting the cheques on behalf of URT. If the defendant acted in good faith and was not negligent, the defendant was entitled to rely on the statutory defence under s. 85 of the Act.

[17] It is also our considered view that the learned judge of the High Court erred by failing to appreciate that the defendant's 2nd affidavit and URT's affidavit would have a determining influence on whether there are some other reasons for a trial of the plaintiff's claim. In this regard we would refer to the case of *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 wherein the Federal Court *inter alia* held that if the defendant cannot point to a specific issue which ought to be tried but the defendant nevertheless satisfies the court that there are circumstances that ought to be inquired into, summary judgment will not be allowed.

[18] Based on the reasons above stated we allowed the defendant's appeal in Appeal No. J-02-521-2006 under which the defendant's Fresh Evidence Application should have been allowed.

[19] We would now deal with the defendant's appeal in Appeal No. J-03-90-2006. Having allowed the defendant's Fresh Evidence Application under Appeal No. J-02-521-2006, it would become apparent that we have to allow the defendant's appeal against the decision of the learned judge in affirming the summary judgment entered against the defendant on 10 March 2006.

[20] It is our judgment that there are a number of circumstances based on the fresh evidence adduced that it warrants a trial of the plaintiff's claim as follows:

(a) the absence of any explanation as to who made the indorsements "For the Credit of United Refrigerators Trading Sdn Bhd" on the cheques and when the cheques were crossed "Account Payee Only";

(b) the disputed fact as to where there is an agreement between the plaintiff and URT that the cheques will be paid into URT's account arising from the closed business relationship between the plaintiff and URT before 2004;

(c) although the defendant had in fact paid 2,150 cheques into URT's account between 1999 and 2005, the plaintiff had never objected to the same. In this regard, it is to be noted that the plaintiff had only raised its objection in 2005.There is no explanation given as to why the plaintiff did not make any protest prior to 2005;

(d) although the plaintiff opened its own current account with the defendant on 14 July 2003, cheques issued to the plaintiff continued to be paid into URT's account. In fact, there is evidence to show the plaintiff had in fact requested for its cheques to be continued to be paid into URT's account after 14 July 2003. There is again no explanation as to why the plaintiff had allowed this to happen; and

(e) there is evidence which show that the proceeds from the cheques were in fact used by URT to reduce the debts owed by the plaintiff to URT. In this regard, there is no explanation as to how much of the plaintiff's debt to URT has been reduced.

[21] Finally, we would deal with the defendant's appeal in Appeal No. J-02-520-2006. In an application for judgment based on admission it is a principle of law that the court has power to enter judgment against a defendant based on an admission of facts made on pleadings or otherwise under O. 27 r. 3 of the RHC 1980. However, it is not a matter of right that a plaintiff can obtain judgment based on an admission of facts under O. 27 r. 3 of the RHC 1980. The court has a discretion as to whether judgment

should and such discretion is exercised depending on the circumstances of the case. (See the case of *In Re Wright Kirke v. North* [1895] 2 Ch. 747). The court will only allow judgment to be entered under O. 27 r. 3 of the RHC 1980 if there is an unequivocal admission of fact which entitles the plaintiff to enter judgment against the defendant. If liability turns on a question of law or mixed fact and law, judgment cannot be obtained. (See the case of *Perwira Habib Bank (M) Bhd v. Hj. Abdullah Hj. Sulaiman & Anor.* [1985] 2 CLJ 489; [1985] CLJ (Rep) 639). As such, if a plaintiff cannot show that all the components of his cause of action have been admitted, the plaintiff is not entitled to judgment under O. 27 r. 3 of the RHC 1980. The court will not exercise its discretion to allow judgment to be entered under O. 27 r. 3 of the RHC 1980 if there are issues to be tried or there is a defence to the action.

[22] Based on the statement of claim, the plaintiff alleged that the defendant converted the remaining cheques. Alternatively, the plaintiff alleged that the defendant should refund the monies under the remaining cheques based on money had and received. We are of the view with regard to the remaining cheques, the plaintiff needs to establish that the plaintiff is the true owner of the remaining cheques in order to maintain an action for conversion or money had and received. (See the case of *Marfani & Co. Ltd. v. Midland Bank Ltd.* [1968] 1 WLR 956).

[23] The plaintiff applied for judgment to be entered against the defendant based on the admission that the defendant had collected and paid the monies under the remaining cheques into URT's account. There is, however, no admission that the true owner of the remaining cheques is the plaintiff. In law, the true owner of a cheque is the person who has possession or an immediate right of possession to the cheque. (See the case of *United Malayan Banking Corp Bhd v. Kek Tek Huat & Ors* [1990] 1 CLJ 429; [1990] 1 CLJ (Rep) 301 SC). In the present case, the plaintiff did not plead that the plaintiff is the true owner of the remaining cheques. The plaintiff did not even exhibit copies of the remaining cheques in support of the Order 27 Application. There is no explanation in the plaintiff's affidavits that the plaintiff is the true owner of the remaining cheques. In the circumstances, the defendant's admission that the remaining cheques have been

paid into URT's account is insufficient for the learned judge to enter judgment against the defendant. As stated earlier, if a plaintiff cannot show that all the components of his cause of action have been admitted, the plaintiff is not entitled to judgment under O. 27 r. 3 of the RHC 1980.

[24] We are of the view since the plaintiff's cause of action was either in conversion or money had and received, the plaintiff ought to have elected one of the causes of action at the latest before applying for judgment to be entered against the defendant. The plaintiff did not however make such an election. (See the case of *United Australia Ltd. v. Barclays Bank Ltd.* [1941] AC 1). The election was important in determining whether the plaintiff could have obtained judgment dated 23 May 2006 based on conversion. This is because the defendant is entitled to rely on the defence of contributory negligence against the plaintiff's claim in conversion. (See s. 12 of Civil Law Act 1956). On this point in the present case there is evidence to show that the plaintiff may be contributorily negligent in handling its own cheques, namely:

(a) he plaintiff's claim involves 2,150 cheques, inclusive of the remaining cheques, that were issued to the plaintiff as payee and paid to URT for a period of six years, namely between 1999 and 2005. In this regard, the plaintiff did not make any protest until 2005; and

(b) there is evidence to show that the plaintiff had themselves delivered some of the cheques to URT for cheques to be deposited into URT's account. In this regard, there is no satisfactory explanation as to why the plaintiff allowed this to continue although the plaintiff had opened its own current account on 14 July 2003.

[25] In the case of *Zanda Investment Ltd. v. Bank of America National Trust and Savings Association & Ors.* [1994] 2 HKC 409, the Hong Kong High Court held that the defendant to be 100% contributorily negligent and could receive nothing on its claim against the banks. Similarly in the present case, there is a triable issue as to whether the plaintiff is entitled to the entire judgment sum or part thereof because there are facts to show that the plaintiff was contributory negligent in the manner in which the plaintiff handled its cheques.

[26] It is our judgment if the plaintiff elected to enter judgment against the defendant for money had and received, the plaintiff must establish that the plaintiff was entitled to those monies. The plaintiff did not produce any evidence to establish that the monies under the remaining cheques belong to the plaintiff. In fact, the plaintiff did not even produce copies of the remaining cheques as exhibits for the Order 27 Application. For the defendant in the present case, the defendant did not admit that the monies under the remaining cheques belong to the plaintiff. In absence of this essential component of the plaintiff's cause of action, the learned judge of the High Court had erred in fact and in law by allowing the judgment dated 23 May 2006 to be entered against the defendant.

[27] We also noted as claimed by the defendant that the monies collected by the plaintiff and paid over to URT were to settle debts due and owing by the plaintiff to URT. Assuming the defendant is liable, the amount should be accordingly reduced because the plaintiff's debt to URT has been accordingly reduced. (See the case of *A.L. Underwood Ltd. v. Bank of Liverpool and Matins* [1924] 1 KB 775). It is therefore a triable issue as to whether the plaintiff is entitled to the entire judgment sum. If the plaintiff is not entitled to the entire judgment sum, there is a further triable issue as to what is the actual amount which the plaintiff is entitled to receive since its debts to URT have been reduced. If the learned judge had considered this issue, we are of the view that the judgment dated 23 May 2006 would not have been allowed.

[28] We further find that it is triable issue as to whether the defendant is entitled to rely on the defence of estoppel against the plaintiff's claim in conversion or money had and received. We adopt the same reasoning as we had found in allowing the defendant's appeal in respect of the summary judgment entered against the defendant on the issue of the defence of estoppel as in Appeal No. J-03-90-2006. In short, the defendant had relied on the plaintiff's own conduct and suffered a change of position by collecting the cheques and paying the proceeds to URT between 1999 and 2005. In the circumstances, it is a triable issue as to whether the plaintiff is estopped from claiming against that defendant is liable either in conversion or for money had and

received. Following the rule in the case of *Re Wright (supra)* the court should not have exercised its discretion in allowing the judgment dated 23 May 2006 to be entered against the defendant.

[29] With regard to the remaining cheques that were crossed in accordance with s. 81A of the Act, it is triable issue as to whether the defendant has a good defence under the Act. Section 85 of the Act provides a statutory defence to collecting banks in respect of claims made by true owners of cheques, whether brought in conversion or for money had and received. Section 85 of the Act relieves a collecting bank from liability provided that the bank discharges its burden in proving that the bank had acted in good faith and without negligence. In determining good faith, s. 95 of the Act stipulates that a thing is deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not.

[30] In order to establish that the defendant was not negligent, the defendant needs to establish that the defendant has taken reasonable care to refrain from taking any such step which the defendant foresees is, or ought reasonably to have foreseen was, likely to cause loss or damage to the true owner. The fact that a cheque has been crossed in accordance with s. 81A of the Act does not necessarily preclude the defendant from claiming this defence. This is clearly stated in s. 85(2)(a) of the Act. In the present case, the defendant collected the cheques having knowledge of the following facts about the plaintiff and URT:

(a) when the defendant collected cheques for URT between 1999 and 2005, URT was already an existing customer with the defendant's Taman Johor Jaya branch. URT opened its account with the defendant since 9 July 1992;

(b) the defendant was at all times aware of the close business relationship between the plaintiff and URT and the URT's cheques paid into URT's account. The closeness of the relationship is exemplified by the fact that the plaintiff made Lim Jeng Hong, a director of URT, an authorized signatory of the plaintiff's account on 14 July 2003;

(c) the defendant was at all times aware that pursuant to the close business relationship, the cheques issued to the plaintiff were paid into URT's account;

(d) the defendant at all times collected cheques that were indorsed "for the credit of United Refrigerators Trading Sdn Bhd", and some of these cheques were not even crossed "Account Payee Only", between 1999 and 2005. At all material times, the plaintiff did not make any protest whatsoever until 2005, that is after the relationship between the plaintiff and URT went sour in 2004; and

(e) Although the plaintiff opened its own current account on 14 July 2003, cheques issued to the plaintiff continued to pay into URT's account without any protest whatsoever from the plaintiff.

Conclusion

[31] For the reasons above stated, we would allow with costs all the three appeal cases. All the orders made by the learned judge of the High Court are hereby set aside. We also make an order that the defence if not filed is to be filed within 14 days from today (6 April 2007). Deposits paid by the defendant are to be refunded to the defendant.